Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 12 and 19 of the Cable	)	
Television Consumer Protection and Competition	)	CS Docket No. 94-48
Act of 1992	)	
	)	
Annual Assessment of the Status of Competition	)	
in the Market for the Delivery of Video Programming	)	

COMMENTS

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INTERNATIONAL, INC.

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EXECUTIVE SUMMARY

In large part due to the pro-competitive policies of the 1992 Cable Act and the Commission's implementing rules, wireless cable has emerged of late as a competitive alternative to wired cable systems. Since the passage of the 1992 Cable Act, the wireless cable industry has experienced substantial subscriber growth. Even more importantly, over the past year the industry has raised over one-half billion dollars in debt and equity financing, assuring that the launching of new systems and addition of new subscribers will accelerate in the coming years. Although only one wireless cable system to date has achieved sufficient subscriber penetration as to free its wired competitor from rate regulation, the availability of capital, the anticipated elimination of MDS and ITFS application backlogs, and the introduction of digital compression technology should result in more wireless systems serving as "effective competition."

Even in those markets where the wireless cable operator has not achieved sufficient penetration to be deemed "effective competition," consumers are benefiting. Wireless cable rates are substantially lower than those charged by wired systems for similar services. In many cases, cable operators have reduced their rates in response to wireless competition, and most have improved customer service.

The benefits of competition from wireless cable can be enhanced by fine-tuning the 1992 Cable Act and the Commission's implementing rules to eliminate unintended impediments to competition. Section 628 of the Communications Act should be amended to assure fair dealing by all programmers, whether or not vertically integrated. If

necessary, Congress should afford the Commission explicit authority over internal cabling devoted to a single multiple dwelling unit, even if such cabling is in common areas. Congress should also amend the Communications Act to permit the non-franchised use of wiring to serve subdivisions, townhomes, trailer parks and other areas that can be wired without crossing public rights of way. In addition, Congress should amend the cross-interest restrictions contained in Section 11(a) of the 1992 Cable Act to promote competition. Also, Congress or the Commission should ban cable operators from seeking or securing deed covenants and other restrictions on the installation of antennas.

Finally, the Commission should develop a reporting system that will permit the broadest possible analysis of the competitive marketplace, while minimizing the reporting burdens on multichannel video programming distributors.

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COMMENTS

The Wireless Cable Association International, Inc. ("WCAI"), by its attorneys, hereby submits its initial comments in response to the *Notice of Inquiry* ("*NOI*") commencing this proceeding.[1]

With the *NOI*, the Commission has embarked upon the process of gathering information necessary to comply with the mandate of Section 19(g) of the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act") that the Commission annually report to Congress "on the status of competition in the market for the delivery of video programming."[2] WCAI is pleased to assist the Commission in this venture, for there can be no denying that the wireless cable industry has been a primary beneficiary of the pro-competitive provisions of the 1992 Cable Act. Yet, as

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[1] *Implementation of Section 19 of the Cable Television Consumer Protection Act of 1992: Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 94-119, CS Docket No. 94-48 (rel. May 19, 1994)[hereinafter cited as "*NOI*"].

[2] 47 U.S.C. § 548(g).

WCAI will discuss in detail below, there is more that can be done to fine-tune the 1992 Cable Act and the Commission's implementing rules so as to promote the emergence of wireless cable and other competitive alternatives to cable.

I. In Large Part Due To The Pro-Competitive Policies Of The 1992 Cable Act And The Commission's Implementing Rules, Wireless Cable Is Emerging As A Competitive Alternative To Wired Cable.

In no small measure thanks to the pro-competitive policies of the 1992 Cable Act and the Commission's implementing rules, there can no longer be any doubt that wireless cable is providing consumers in many markets with a competitive alternative to their wired cable service provider, and will soon be expanding across the country.

A. The Wireless Cable Industry Has Experienced Substantial Growth Since Passage of the 1992 Cable Act.

The wireless cable industry has experienced substantial growth over the past two years. When Congress was debating the 1992 Cable Act, the wireless cable industry was operating just 45 systems, serving approximately 350,000 subscribers.[3] Today, WCAI estimates that there are 143 systems in operation, serving 550,000 homes. Perhaps more

[3] S.R. No. 102-92, 102d Cong., 1st Sess., at 14.

importantly, experts such as Paul Kagan Associates, Inc. ("Kagan") are predicting that wireless cable will experience continued dramatic growth throughout the decade:

Year	Estimated Year-end Subscriber Total	Percent Increase from Prior Year
1994	846,000	113%
1995	1,372,000	62%
1996	1,856,000	35%
1997	2,274,000	23%
1998	2,635,000	16%
1999	2,987,000	13%
2000	3,289,000	10%

Source: Paul Kagan Associates, Inc., Wireless Cable Investor, No. 412, at 2 (April 25, 1994).

Annexed as Attachment A is a map of the United States which graphically illustrates the currently operating wireless cable systems as well as those planned to launch later this year and thereafter.

B. The Recent Availability Of Capital, Coupled With Commission Action On Application Backlogs, Should Fuel A Rapid Expansion Of The Wireless Cable Subscriber Base.

The rapid growth of the wireless cable industry has been fueled by recent debt and equity financings that almost certainly would not have been made but for investor confidence in wireless cable engendered by the 1992 Cable Act and the FCC's implementing rules. As Kagan noted earlier this year:

> What a difference a year makes, or had better. Last spring, the nascent wireless cable industry was searching for capital to grow with after 23 years of making do with what little equity it had patched together.

> $240 mil. later, via a dozen new public offerings plus millions in private funding, the industry is on Wall Street as a growth play.[4]

Since that was written, additional funding has more than doubled the equity raised by the wireless cable industry this year. Earlier this month, the *Wall Street Journal* took note of the more than $440 million worth of initial and secondary stock offerings by wireless cable operators in the past year and concluded that "Wall Street loves wireless."[5] Indeed, just last week American Telecasting, Inc. announced that it had closed on an unprecedented $100 million high-yield debt offering.[6] While much of the funding raised to date has gone towards system acquisition, a not insubstantial portion has gone to system expansion. To cite just one of many possible examples, following a successful initial public offering last year, People's Choice TV Corp. ("PCTV") has almost doubled its subscriber base in Tucson from approximately 13,000 to 22,000.

A recent survey conducted by WCAI revealed that, with the exception of a small number of rural systems, most wireless cable operators intend to compete against wired cable systems. Yet, it is rare at the present time for a wireless cable system to be "effective competition" to a competing wired cable system such that the wired system is freed from rate regulation. To WCAI's best knowledge, only the wireless cable system

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[4]*Wireless Cable Investor*, No. 412, at 1 (April 25, 1994).

[5]Lee, "Wireless Cable-Television Sector Is on Acquisition Binge," *Wall St. J.* (June 8, 1994).

[6]Gibbons, "Big Deal Inspires Ops At Wireless Show," *Multichannel News*, at 3 (June 27, 1994).

in Riverside/San Bernardino, CA has achieved sufficient penetration into the marketplace that it meets the fifteen percent benchmark of Section 76.905(b)(2)(ii) of the Rules. This can be traced to several factors.

First and foremost, until recently the wireless cable industry lacked the financial wherewithal to reach the fifteen percent benchmark. Although wireless cable technology is significantly less expensive to deploy than traditional coaxial cable,[7] it is not inexpensive. The initial cost of starting a system, before adding the first subscriber, can range from just under $1 million for a small, relatively unsophisticated rural system, to several million dollars for a state-of-the-art major market facility. Although the marginal cost of adding a subscriber will vary from system to system depending upon the sophistication of the technology employed, marketing expenses and other variables, it generally runs in the neighborhood of $400-600. Thus, it takes substantial capital to develop any significant subscriber base, much less one that qualifies a wireless system as "effective competition" under Section 76.905(b)(2)(ii). The wireless cable operator in Riverside/San Bernardino, CA was a rarity -- it was sufficiently well-funded that it was able to add subscribers rapidly while other wireless operators were raising initial capital. With the recent influx of capital into the industry, WCAI anticipates that by this time next year, far more wired cable systems will find themselves subject to effective competition from wireless cable.

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[7]Lee, "Wireless Cable-Television Sector Is on Acquisition Binge," *Wall St. J.* (June 8, 1994).

Second, several nascent wireless cable systems have focused their initial marketing and installation efforts on uncabled areas in order to maximize the efficiency of those efforts. It should come as no surprise that wireless cable systems generate higher penetration rates in uncabled areas than in those areas where they compete against wired cable. New systems can maximize the number of subscribers per marketing dollar by targeting uncabled areas, while at the same time reducing installation costs in those areas through economies of scale associated with making multiple installations in close proximity to each other. As a result, many operators tend immediately after system launch to focus towards serving the uncabled market, diverting resources to cabled areas only as the demand in uncabled areas becomes sated. Thus, over time the percentage of wireless cable subscribers residing in areas served by wired cable should increase.

Finally, many wireless cable systems operating today lack sufficient channel capacity in their markets to provide a viable alternative to wired cable. The thirty-three Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") channels in the 2150-2162 MHz and 2500-2690 MHz band are adequate (albeit just barely) for the provision of a service that is competitive with wired cable. When more than a handful of those channels are unavailable to the wireless cable system, however, the public does not perceive the wireless service as a viable alternative.

Although in some major markets channel unavailability is the result of extensive use of ITFS channels for educational purposes, by and large the wireless cable channel shortage is attributable to the various application processing backlogs and resulting freezes

that have plagued the MDS and the ITFS for the past several years. Operators suffering from a lack of critical channel mass generally target their marketing towards non-cabled areas until additional channel capacity can be secured. WCAI is confident that the actions announced by the Commission at its June 9, 1994 open meeting to expedite application processing should substantially eliminate the backlogs, permit lifting of the application freezes and result in most essential MDS and ITFS channels being licensed within the next eighteen months. As wireless cable operators garner additional channel capacity, their ability to compete directly with wired cable will be enhanced.

C. Digital Compression Technology Should Make Wireless Cable A More Effective Competitor To Wired Cable, Although It Is Uncertain When Such Technology Will Be Widely Available.

In addition, the ability of many wireless cable operators to effectively compete with entrenched wired systems likely will be enhanced in the not-too-distant future by the introduction of digital compression to the industry. Cross Country Wireless Cable, Inc. ("Cross Country"), for example, has announced plans to develop digitally compressed systems in the Los Angeles area, where heavy educational use of the ITFS channels has heretofore thwarted wireless cable system development.[8] A consortium of wireless cable operators and major equipment suppliers has formed The Wireless Cable Research and Development Center (the "R&D Center") to introduce digital compression into the wireless cable environments as soon as practicable and to develop interactive video, data

[8]Katz, "Cross Country: We Have L.A. Wireless Market," *Multichannel News*, at 6 (June 27, 1994).

and voice use of the 2.1 GHz and 2.5 GHz bands.[9] At last week's Seventh Annual Wireless Cable Convention and Exposition, both digital compression and wireless interactive services were demonstrated.

The Commission must recognize, however, that it is still too early to predict with any degree of certainty when digital compression technology will be introduced into the wireless cable marketplace on any broad scale. Digital compression equipment is not currently available for use in wireless cable, and even the most optimistic estimates suggest that equipment will not be available until the first quarter of 1995 at the very earliest. Moreover, the Commission's current MDS and ITFS technical rules do not contemplate the use of digital modulation schemes, and will have to be amended. The R&D Center is currently engaged in tests designed to develop data for use by the Commission in amending its rules to accommodate digital technology. It will be several months, however, before those results can be presented to the Commission and, if history is any guide, at least a year before final rules can be adopted. Compounding matters, the Commission recently announced that it intends to explore adoption of technical standards to govern digital video services generally; it is unclear whether this announcement will

[9]*See, e.g.* "Wireless Industry Creates R&D Lab," *Cable World*, at 3 (April 26, 1993); "Wireless Cos. Look to Compression," *Multichannel News*, at 2 (April 26, 1993); "In Brief," *Broadcasting*, at 80 (April 26, 1993).

either slow equipment development until the Commission acts, or delay any rulemaking specifically focused on the MDS and ITFS technical rules.[10]

While some wireless cable systems may launch digitally compressed systems or rapidly convert to compression once equipment becomes available, other wireless systems will take a different approach. Because initial costs of set-top decompression units are likely to be high, many wireless cable operators contemplate the development of so-called "hybrid" systems. Simply stated, operators hope to digitally compress a few ITFS channels, transmit all ITFS programming over those compressed channels, and outfit ITFS receive sites with decompression equipment, while utilizing the remaining channels in a non-compressed analog mode to transmit commercial programming to wireless cable subscribers. The net effect will be to free additional channels for commercial use without having to outfit the wireless cable subscriber base with expensive decompression equipment. Then, as the price of decompression equipment falls (as it inevitably will), wireless cable operators will convert to full digital operation as and when local marketplace conditions demand. Before "hybrid" systems can be developed, however, the Commission will have to amend its rules regarding ITFS minimum usage requirements to accommodate the shifting of all ITFS programming to digitally compressed channels.

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[10] *Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992: Compatibility Between Cable Systems and Consumer Electronics Equipment*, FCC 94-80, ET Docket No. 93-7, at ¶ 144 (rel. May 4, 1994).

D. Even In Markets Where Wireless Cable Penetration Is Less Than 15%, Consumers Are Enjoying The Benefits Of Competition.

Although wireless cable systems often cannot provide consumers access to as many channels as their wired competitors, there is no question that they can provide most of the programming consumers value highly at substantially lower rates. Even in markets where the wireless cable operator has yet to achieve sufficient penetration to be deemed effective competition pursuant to Section 76.905(b)(2)(ii), wireless cable has yielded substantial benefits. For example;

- In the New York metropolitan area, the wireless cable operator's most popular package includes all of the local VHF/UHF signals, eleven basic cable channels, two regional sports services, one premium service, a program guide and a remote control for $34.95. Comparable packages from the wired cable system operators in the area cost consumers from 15% to 30% more.

- The Chicago wireless cable operator, which just began offering service to single family homes, offers a 22 channel basic package for $19.99 -- 20% to 25% less than comparable services offered by the wired systems in the area.

- The 22,000 subscriber Tucson, AZ wireless cable system offers an $18.00 basic package, versus approximately $24.00 for similar packages by its wired cable competitors. The wireless operator charges $6.95 for each a la carte premium channel, compared with wired cable charges of $7.95 to $11.95 for the same programming.

- In Houston, the recently-launched wireless system charges consumers approximately $20.00 for basic service, while competing wired cable systems charge approximately $7.00 more for similar service. While the wireless operator charges $7.95 for premium services, the same services cost wired cable subscribers approximately $12.00.

- The Philadelphia wireless cable system charges consumers $23.95 for basic service plus one premium service. Its primary wired competitor charges $31.50 for a comparable service. Wireless subscribers desiring to add the local sports channel

pay an additional monthly charge of $8.95; cable subscribers pay up to $14.20 for the same service.

- In Las Vegas, NV, the wireless cable operator charges $18.95 for a basic package of 30 channels (including local off-air channels), while its primary competitor charges $24.02 for a 42 channel basic package (including local broadcast signals and 3 PEG channels).

- The wireless system in Lima, OH charges $18.95 for a 22 channel basic package, while its wired competitors charge 10% to 20% more for basic packages of 28 to 36 channels.

- The recently-launched wireless system in St. Louis charges consumers approximately $20.00 for basic service, while competing wired cable systems charge approximately $7.00 more for similar service. While the wireless operator charges $7.95 for premium services, the same services cost wired cable subscribers approximately $12.00.

The experience in Riverside/San Bernardino, where the nation's largest wireless cable system is operated by Cross Country, is illustrative of how even cable subscribers will benefit from wireless cable. Prior to September 1991, the cable systems in Riverside/San Bernardino generally ignored Cross Country. At the time, Cross Country had garnered 15,000 subscribers by offering twenty channels of programming (including two premium services and one pay-per-view service). Cross Country charged $16.95 for basic service, plus a monthly program guide and a remote control. Premium services were available for $7. Comparable wired cable packages cost approximately $20-25 for basic and approximately $10 for premium services.

By April 1994 (the most recent period for which data is available), the situation had changed dramatically. Cross Country had grown to 42,000 subscribers, adding eleven channels to its lineup (two of which were premium services), while raising its basic

service rate to $18.95 and actually cutting its rate for basic service plus one premium service to $22.95. The wired cable systems in the area responded in kind, raising their basic service rates approximately $2 while reducing their rates for basic plus one premium service to the $25-28 range. Clearly, the presence of Cross Country in the marketplace has yielded substantial cost savings not only for Cross Country's subscribers, but for all consumers in the region.

Riverside/San Bernardino is not the only market where wireless competition has impacted cable's pricing.[11] Moreover, the presence of wireless cable can benefit consumers in other ways. For example, competition from wireless cable systems has already spurred cable operators to construct their systems rapidly.[12] Wireless has already been cited as motivating competing coaxial systems to develop marketing plans that result in lower costs to the consumer.[13] And, wireless operators report that their cable competitors generally improve customer service once wireless establishes itself as a competitive threat.

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[11]Stump, "Toe to Toe with a Wireless Competitor," *Cable World*, at 28-29 (Oct. 5, 1992; "In the Trenches: Cable vs. Wireless, How Do Cable Operators Fight Back Against Price-cutting Competition?", at 13 (Aug. 24, 1992); Kerver, "Wireless Cable: Friend or Foe," *Cablevision*, at 20-24 (Oct. 5, 1992).

[12]In Detroit, MI, for example, competition from the local wireless cable operator is believed to be largely responsible for completion of the local cable system almost a year ahead of schedule. Similarly, there is no question that a major upgrade of the local cable system in Charlottesville, VA is attributable to the introduction of wireless cable competition.

[13]*See* "Cable's slow to warm up to Dolan clustering plan," *Cable World*, at 4 (July 17, 1989).

II. FINE-TUNING OF THE 1992 CABLE ACT AND THE COMMISSION'S IMPLEMENTING RULES WILL ELIMINATE UNINTENDED IMPEDIMENTS TO COMPETITION.

A. Amending Section 628 of the Communications Act To Assure Fair Dealing By All Programmers, Whether Or Not Vertically Integrated, Will Promote Competition.

With just a few exceptions, the provisions of the 1992 Cable Act designed to assure wireless cable operators fair access to programming have proven effective. The relative paucity of complaints filed with the Commission on program access issues strongly suggests that most programmers are making good faith efforts to comply with the letter and with the spirit of the law.

Yet, events since passage of the 1992 Cable Act demonstrate that loopholes exist which can be taken advantage of to deprive emerging multichannel video programming distributors ("MVPDs") of fair access to programming. In retrospect, the greatest flaw in the 1992 Cable Act's efforts to promote fair access to programming was Congress' decision to limit the scope of Section 19 to only those programmers in which a cable operator has an attributable interest.

Simply put, the power that wired cable exerts over programmers stems not only from vertical integration, but also from its status as the current local distribution monopoly. Wireless cable, Direct Broadcast Satellite ("DBS") and other emerging technologies will some day provide effective local distribution outlets for programmers. Today, however, their subscriber base is so small that no programmer can hope to survive

without substantial wired cable carriage. As a result, all programmers, whether or not vertically integrated, are subject to the market power of wired cable.[14]

For example, some wireless cable operators report paying up to fifty percent more for ESPN than similarly situated wired competitors. One wireless cable operator has been refused access to pay-per-view programming by a non-integrated programmer. While that programmer has claimed that the Tocom set-top box used by the wireless operator lacks sufficient security, the very same set-top unit is employed by wired cable systems with access to the pay-per-view programming.

The recent round of negotiations between wireless cable operators and affiliates of the Fox Broadcasting Network ("Fox") over retransmission consent illustrate the market power of entrenched wired systems. During those negotiations, wireless cable operators were advised they would have to pay retransmission consent fees of $.25 per subscriber. Wired cable operators, by way of contrast, received free retransmission consent if they agreed to pay the same $.25 per subscriber for Fox's new programming service, FX. Wireless operators were advised, however, that FX would be available only to franchised cable systems. Based on subsequent discussions with Fox affiliates, wireless cable operators believe that TCI had been able to extract cable exclusivity from Fox for FX by

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[14]Indeed, when Sumner M. Redstone, Chairman of Viacom International, Inc. ("Viacom"), recently testified before the Senate Subcommittee on Antitrust, Monopolies, and Business Rights concerning the anti-competitive abuses Viacom has suffered at the hands of Tele-Communications, Inc. ("TCI"), he forthrightly admitted that Viacom had been subjected to abuse, yet failed to come forward before because it feared retaliation. *Communications Daily*, Vol. 13, No. 208 at 2 (released October 28, 1993).

implicitly or explicitly threatening to drop Fox's broadcast affiliates from TCI's cable systems and/or refusing to carry FX absent a grant of exclusivity.[15] Given TCI's monopoly status in its markets, it is understandable that Fox has had to capitulate.

While Fox's actions are understandable, they hardly advance the pro-competitive policies of the 1992 Cable Act. By amending Section 628 to extend its reach to all programmers, whether or not vertically integrated, Congress can assure that the wired cable monopoly does not leverage its market power into exclusive programming agreements that are contrary to the public interest.

B. If Necessary, The Commission Should Seek From Congress Authority Over Internal Cabling Devoted To A Single Multiple Dwelling Unit, Even If Such Cabling Is In Common Areas.

As WCAI has previously demonstrated to the Commission in MM Docket No. 92-260, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, wired cable operators have frequently exploited the wiring used to provide cable service as a weapon against emerging competition.[16] The pending petitions for reconsideration in MM Docket No. 92-260 spell out in detail the flaws in the rules adopted by the Commission to govern the ownership of inside cabling once a

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[15]Indeed, while wireless cable operators are generally being required to pay $0.25 per subscriber per month for the right to retransmit local Fox affiliates, franchised cable systems are securing the retransmission consent and access to FX for the same $0.25 per subscriber per month. Thus, FX is not only being available to the cable industry on an exclusive basis, it is free.

[16]*See* comments of WCAI, MM Docket No. 92-260, at 8 (filed Dec. 1, 1992); Reply Comments of WCAI, MM Docket No. 92-260, at 2-3 (filed Dec. 14, 1992).

consumer terminates cable television service. While in the interest of brevity WCAI will not repeat the many arguments before the Commission in MM Docket No. 92-260, the pleadings establish that in order to promote competition in multiple dwelling units ("MDUs"), the Commission should revise its designation of the demarcation point for cable home wiring in MDUs as the point at or about twelve inches outside of where the cable enters the subscriber's individual unit.

As Liberty Cable Company, Inc. noted in its petition for reconsideration in MM Docket No. 92-260, the Commission's designated demarcation point is impractical because "wire within twelve inches of a subscriber's premises is buried in a brick, concrete or cinder block wall or concealed in a conduit and is not, therefore, readily accessible without causing substantial damage to the building and the subscriber's apartment."[17] Similar sentiments were expressed by WCAI, wireless cable operator WJB-TV Limited Partnership, USTA, Bell Atlantic, Pacific Bell, Nevada Bell, and the NYNEX Telephone Companies.[18] WCAI has urged the Commission to afford each resident of an MDU

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[17]Petition of Liberty Cable Co. for Reconsideration and Clarification, MM Docket No. 92-260, at 3 (filed April 1, 1993).

[18]*See* Comments of WCAI, MM Docket No. 92-260, at 1 n. 2 (filed Dec. 1, 1992); Response of WJB-TV Limited Partnership, MM Docket No. 92-260, at 2-5 (filed April 15, 1993); Reply Comments of USTA, MM Docket No. 92-260, at 5-6 (filed June 2, 1993); Response of Bell Atlantic, MM Docket No. 92-260, at 3-4 (filed May 18, 1993); Petition for Reconsideration of the NYNEX Telephone Companies, MM Docket No. 92-260, at 3-4 (filed April 1, 1993); Comments of Pacific Bell and Nevada Bell, MM Docket No. 92-260, at 2 (filed May 18, 1993).

control over any and all wiring and associated devices devoted exclusively to the provision of service to his or her individual unit.

The cable industry, however, has opposed efforts to give each resident of an MDU effective control over the wiring devoted to his or her unit by claiming that the Commission lacks authority to govern cabling extending beyond the interior premises of a consumer's individual unit.[19] That argument has been effectively refuted -- the Commission has ample authority under the Communications Act of 1934, as amended (the "Communications Act"), to afford a consumer control over all of the wiring devoted exclusively to providing service to his or her individual unit.[20]

Should for whatever reason the Commission determine it lacks authority to establish a new demarcation point, WCAI urges the Commission to specifically report on that defect in the Communications Act and seek additional authority from Congress. Certainly, there can be no public interest justification for permitting continued abuse by wired cable of inside cabling in MDUs.

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[19] *See* Time Warner Entertainment Co., L.P. Response to Petitions For Reconsideration, MM Docket No. 92-260, at 4-5 (filed May 18, 1993); Opposition of Nat'l Cable Television Ass'n to Petitions for Reconsideration, MM Docket No. 92-260, at 5 (filed May 18, 1993).

[20] *See, e.g.* Reply of Bell Atlantic, MM Docket No. 92-260, at 2-4 (filed June 3, 1993); Reply of the NYNEX Telephone Companies, MM Docket No. 92-260, at 3-4 (filed June 3, 1993).

C. The Commission Should Request That Congress Amend The Communications Act To Permit The Use Of Wiring To Service Subdivisions, Townhomes, Trailer Parks And Other Areas That Can Be Wired Without Crossing Public Rights-Of-Way Without A Cable Franchise.

As wireless cable has begun to emerge, operators have discovered that one of the greatest impediments to competition stems from legal restrictions on their ability to run wiring over private property to interconnect homes in subdivisions, townhomes, trailer parks or other types of dwellings without a cable franchise.

One of the perceived drawbacks of wireless cable is the need to mount a reception antenna at the subscriber's premises. As a result of recent technological advances, wireless cable reception antennas continue to get smaller, while new antenna shapes have been developed to make reception antennas unobtrusive. Nonetheless, the developers or governing boards of subdevelopments and townhome communities and the owners of trailer parks sometimes refuse to permit wireless cable operators access to their property unless service can be provided from a single reception antenna connected to a coaxial cable distribution system.[21]

Under the current provisions of the Communications Act, wireless cable operators are legally barred from responding to requests for service under such circumstances. Section 621(b)(2) of the Communications Act mandates that every cable system operator have a cable franchise. Section 602(7) of the Communications Act, which defines a

[21]In some cases, this refusal stems from agreements extracted by wired cable operators that ban antennas. In order to promote competition, Congress or the Commission should ban cable operators from seeking or securing such agreements. *See, infra* at II.E.

"cable system" as "a facility, consisting of a closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . . ," has been deemed to encompass systems that use wiring, even if strung entirely over private property, to interconnect individual buildings where the so-called "private cable exception" does not apply.

The flaw in Section 602(7) is patent; it extends the cable franchise requirement to systems that are located wholly upon private property and do not use any public right-of-way. In many cases, particularly where localities have imposed universal service requirements, it is not possible for the wireless cable operator to secure a franchise.[22] The Commission itself has recognized that the central basis for imposing franchise regulation on cable systems was that such systems use the public right-of-way.[23] Amending Section 602(7) to allow wireless cable systems to make limited, non-franchised use of wiring to interconnect dwellings without crossing public rights-of-way will promote the ability of alternative technologies to compete, without undercutting the fundamental predicate of local franchise regulation.

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[22]Moreover, as discussed in detail in the following section, the wireless cable operator is barred from owning and operating a "cable system" that overlaps its wireless cable protected service area.

[23]*See Definition of A Cable System*, 5 FCC Rcd 7638, 7642 (1990).

D. Congress Should Amend The Cross-Interest Restriction Contained In Section 11(a) Of The 1992 Cable Act To Promote Competition.

In the almost two years that have passed since passage of the 1992 Cable Act, it has become abundantly clear that the cross-interest restrictions set forth in Section 11(a) fail to adequately meet Congress' objectives. Ironically, experience has shown that Section 11(a) is both over-inclusive and under-inclusive.

1. Congress Should Afford The Commission Greater Flexibility In Permitting Cross-Ownership Between Wireless Cable And Wired Cable Systems In Overbuild Situations.

Well before passage of the 1992 Cable Act, the Commission promulgated rules that generally barred a cable operator from holding a license for, or leasing transmission capacity of, any MDS station having a protected service area that overlaps the cable operator's franchise area.[24] These rules were designed to preclude a cable operator from frustrating competition by warehousing spectrum that could be employed by a wireless cable operator. In designing its rules, the Commission crafted what became known as the "overbuild exception," permitting a cable system franchisee to hold a license for or lease transmission capacity of an MDS station regardless of any overlap where there were two or more cable franchisees serving the franchise area.

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[24] *Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting: Private Operational-Fixed Service, Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Instructional Television Fixed Service, and Cable Television Relay Service*, 5 FCC Rcd 6410, 6417 (1990), *on recon.* 6 FCC Rcd 6764, 6775-76 (1991).